

**REMARKS/ARGUMENTS**

This amendment accompanies a request for continued examination.

Claims 26 – 46 were examined, and all were rejected in the final office action mailed February 4, 2010. An amendment substantially identical to the foregoing amendment was filed on March 26, 2010, but was deemed to have changed the scope of the claims and was not entered.

Claims 26 – 46 remain pending in this application. Claim 26 is amended herein to more particularly point out and distinctly claim subject matter that the inventor regards as the invention. An amended herein, claim 26 now incorporates the subject matter of claims 37 and 39. No new matter is added. Claims 37 and 39 are canceled.

Entry of the amendment and reconsideration of the rejections is requested in view of the accompanying RCE.

***Claim Rejections - 35 USC § 102***

Claims 26 – 30, 33, 35 – 36, 38, 43 – 44, and 46 were rejected under 35 UCS § 102(b) as being allegedly anticipated by Schulze (US 3,708,952). The rejection is traversed.

Claim 26 as currently amended is directed to a method of filling a flexible-walled container by

- (i) purging substantially all oxygen from the interior of the container by introducing an inert gas,
- (ii) introducing a foodstuff into the container,
- (iii) over-inflating the container with inert gas beyond a desired volume,
- (iv) subsequently (*i.e.*, after introducing the foodstuff) mechanically squeezing the flexible wall of the container in order to remove a selected volume of the inert gas from the container to leave the desired volume remaining in the container, the volume of inert gas remaining in the container being selected to reduce agglomeration of discrete pieces of foodstuff, prior to sealing the container.

Schulze does not disclose either mechanically squeezing the flexible walls to remove a selected volume of inert gas or selecting a volume of inert gas so that the agglomeration of

discrete pieces of foodstuff is reduced, and the examiner recognizes that these elements are not found in Schulze (see paragraphs 39 and 46 of the final action).

Because Schulze does not disclose or suggest all the elements of claim 26, Schulze cannot anticipate that claim under 35 USC § 102(b), and claim 26 is allowable over Schulze. Furthermore, a dependent claim comprises all of the features of its base claim. Here, all of the remaining claims 27 – 36, 38, and 40 – 46 depend directly or indirectly from claim 26. Therefore, without prejudice to their own individual merits, those claims are also deemed allowable for at least the same reasons as their base claim.

Based on the arguments presented above, reconsideration and withdrawal of the 35 USC § 102(b) rejection of claims 26 – 36, 38, and 40 – 46 are respectfully requested.

#### *Claim Rejections - 35 USC § 103*

For an invention to be obvious, 35 USC §103(a) requires that

... the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

To establish a *prima facie* case of obviousness, the Office must use the framework for determining obviousness set forth in *Graham v. John Deere Co.*, 383 US 1, 148 USPQ 459 (1966). That framework consists of determining the scope and content of the prior art; ascertaining the differences between the prior art and the claims at issue; and resolving the level of ordinary skill in the pertinent art. Secondary considerations such as commercial success, long felt but unsolved needs, failure of others, etc., may also be evaluated by the Office to give light to the circumstances surrounding the origin of the claimed subject matter. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 US 398 (2007) affirmed the applicability of the framework laid down in *Graham*.

Claims 31, 32, 34, 37, 39, 40 – 42, and 45, were rejected under 35 USC § 103(a) as being allegedly unpatentable over Schulze in view of Laudenberg (US 6,199,601), Fang (US 4,736,572), Wilson (US 4,027,456), Kühnle (US 3,813,847), and/or Shima (US 4,891,007). These rejections are traversed with regard to the claims as currently presented.

Claims 37 and 39 are canceled, rendering their rejection moot.

Claims 31, 32, 34, 40 – 42, and 45 all depend directly or indirectly from claim 26, and it is noted that the secondary references are relied on only for the additional features of those claims. However, those references do not provide all of the features of claim 26 missing from Schulze, as discussed above.

Schulze describes a packaging machine that fills pouches with particulates from a nozzle while propelling gas through the same nozzle. This method almost always over pressurizes the pouch by forcing gas into it. Excess gas necessarily “escapes or bleeds upwardly from the upper end of the pouch as a result of the pouch being somewhat over-purged with carbon dioxide.” Schulze therefore simply teaches that the pouches can be filled with the gas but that gas should be allowed to escape if the pouches are over pressurized. As the examiner has already acknowledged, there is absolutely no suggestion in Schulze of mechanically squeezing the flexible wall of the container in order to remove a selected volume of the inert gas from the container to leave the desired volume remaining in the container, the volume of inert gas remaining in the container being selected to reduce agglomeration of discrete pieces of foodstuff.

Furthermore, a person of ordinary skill in the art considering the teachings of Schulze would be positively dissuaded from arriving at the invention of claim 26 by the simultaneous, continual, and inexact “over-purging” methodology promoted by Schulze, as opposed to the stepwise and exact over-inflating and subsequent gas removal method defined in claim 26.

Claim 26 is therefore clearly inventive over the prior art.

Since Schulze lacks any teaching of stepwise and exact over-inflating and subsequent gas removal, the examiner is forced to turn to Wilson to supply them. However, the examiner’s interpretation of Wilson is not correct. Although Wilson does discuss squeezing together the walls of the pouch (col. 2, lines 18-23) and the use of “pinch rolls” in general (col. 5, lines 9-15), the pinch rolls are used during the part of the process carried out *prior to* filling of the pouch in order to ensure no air remains in the pouch. This is very different from the method defined in the claims because all of the steps referred to by the Examiner occur in Wilson pre-filling, not post-filling as in the present invention. It would therefore be impossible for someone to combine Wilson and Schulze and arrive at the claimed method. No one skilled in the art would subject a package already containing foodstuffs to squeezing with pinch rolls *after* filling, since the

foodstuff would become crushed even if it were not squeezed out of the pouch. Furthermore, the "infinitesimally small" amounts of air referred to by the Examiner demonstrate that the finished product is effectively a vacuum packed product (*see*, col. 2, line 39). This is entirely inconsistent with the method of the invention, as discussed below.

Kuhnle talks only about introducing protective gas into the container "if the containers contain relatively large lumps or agglomerates of sharp-edged materials" (col. 3 (not col. 2 as suggested by the Examiner) lines 64-68), which is unrelated to the method of the present invention. Kuhnle does not disclose the step of mechanical squeezing, either. Kuhnle thus cannot suggest modifying Schulze to arrive at the step of mechanically squeezing the flexible wall of the container in order to remove a selected volume of the inert gas from the container to leave the desired volume remaining in the container, the volume of inert gas remaining in the container being selected to reduce agglomeration of discrete pieces of foodstuff.

The step of mechanically squeezing the flexible wall of the container in order to leave the desired volume remaining in the container has a number of significant advantages over the prior art. For example, the resulting package is deliberately not "vacuum packed" but instead deliberately retains a significant quantity of inert gas, which renders the sealed package soft and malleable. This is much more appealing to the consumer because the packaged foodstuff retains its original, familiar characteristics. This also reduces the pressure applied to the foodstuffs by the internal walls of the package thereby avoiding damage to often delicate foodstuffs. (Indeed, passing the filled package through pinch rolls to remove gas would ruin the foodstuffs.) The reduced packing pressure on the foodstuff while stored in the pouch makes it easier to dispense the contents of the package when it is opened by the consumer.

The remaining references, to the extent they may show isolated details of the claimed invention, nevertheless fail to supply the elements missing from the art: mechanically squeezing the flexible wall of the container in order to remove a selected volume of the inert gas from the container to leave the desired volume remaining in the container, the volume of inert gas remaining in the container being selected to reduce agglomeration of discrete pieces of foodstuff.

Accordingly, the section 103 rejections are not tenable. Not only is claim 26 novel and non-obvious over the cited references, the remaining claims, which depend directly or indirectly

from claim 26, are allowable over the cited references for at least the same reasons claim 26 is novel and non-obvious, apart from their individual merits.

Based on the arguments presented above, reconsideration and withdrawal of the section 103 rejections are respectfully requested.

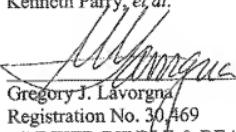
*Conclusion*

No other matters remain. In view of the foregoing amendment and remarks, applicants respectfully submit that the present application, including claims 26 – 46, is in condition for allowance and an early notice of allowance is respectfully requested.

If the Examiner believes that direct communication with the Applicant's attorney would advance the prosecution of this application, the Examiner is invited to telephone the undersigned at the number listed below.

Respectfully submitted,

*Kenneth Parry, et al.*

BY:   
Gregory J. Lavorgna  
Registration No. 30,469  
DRINKER BIDDLE & REATH LLP  
One Logan Square, Ste. 2000  
Philadelphia, PA 19103-6996  
Tel: 215-988-3309  
Fax: 215-988-2757  
*Attorney for Applicant*